COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2837-CR **Cir. Ct. No. 2009CF5052**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Daniel Johnson appeals from a judgment of conviction on two counts of failure to support. He also appeals from an order denying without a hearing his postconviction motion for relief. Johnson contends that his motion alleging ineffective assistance of trial counsel was sufficiently

pled, entitling him to a hearing on the motion. We disagree and affirm the judgment and order.

¶2 Johnson was charged with two violations of WIS. STAT. § 948.22(2) for failure to pay child support for his children during two periods: May 1, 2008 through October 31, 2008, and February 1, 2009 through June 30, 2009.[1] Johnson waived a jury trial. He stipulated that he had made no child support payments in the charged periods and that he knew child support had been ordered, and he raised an affirmative defense of inability to pay. *See* WIS. STAT. § 948.22(6) ("[A]ffirmative defenses include … inability to provide" child support.).

¶3 Johnson suffered a wrist injury in 1995 while he was in the Marine Corps, and a back injury in 2004 while he worked for a private company. During trial, he attempted to introduce a letter, dated August 8, 2008, from the chief physician assistant at the Milwaukee Veterans' Affairs Medical Center. This letter, dated during the first period of non-support, stated that Johnson's disabilities "prevented him from working a normal job." The State objected to the letter, which had not been turned over in discovery and was not produced until the afternoon of the first day of trial. The trial court sustained the objection. Johnson had also obtained a letter from the Veterans' Administration, dated September 20, 2010, that ostensibly confirmed his 100% disability rating during the charged periods of non-support. Trial counsel never attempted to use that letter at trial.

[1] "Any person who intentionally fails for 120 or more consecutive days to provide … child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class I felony." WIS. STAT. § 948.22(2).

¶4 The State presented evidence suggesting that, despite his disabilities, Johnson was employed as a painter, though the evidence directly pertained to time outside the charged periods. Johnson testified in rebuttal that he was not formally employed, suggesting, for instance, that he was doing a favor for his sister.

¶5 The State also presented evidence regarding the family court orders for support. As part of his veteran's benefits, Johnson apparently received funds meant specifically for his children's support, and had been ordered to forward those amounts to his ex-wife. Additionally, Johnson had secured a worker's compensation settlement following his 2004 injury. The terms of the settlement included a $1000 per month payment, and the family court ordered Johnson to forward $290 per month in support out of that payment.[2]

¶6 The trial court determined that the orders "speak for themselves," that Johnson lacked credibility, that he had been working as a painter during the charged time periods, and that his failure to pay was intentional. It found him guilty of the two counts of failure to support, and sentenced him to concurrent terms of one year's initial confinement and two years' extended supervision.

¶7 Johnson filed a postconviction motion for relief. He alleged multiple claims of ineffective assistance of trial counsel. Alternatively, he claimed that he had been sentenced on inaccurate information. On appeal, however, the only claim that Johnson pursues is a claim that his trial attorney was ineffective when he failed to seek an adjournment to further investigate the two letters regarding Johnson's disabilities.

[2] Johnson omits any discussion of these facts from his main brief.

¶8 Following briefing, the circuit court adopted the State's brief, incorporated it by reference, and denied Johnson's motion without a hearing. On appeal, Johnson asserts that his motion was sufficiently pled to at least entitle him to a ***Machner*** hearing on trial counsel's performance.[3]

¶9 Not every claim of ineffective assistance of counsel entitles a defendant to a hearing on the motion. *See* ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409, 410 n.3 (Ct. App. 1998). Instead, a hearing on a postconviction motion like Johnson's is required only when the movant states sufficient material facts which, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996). If the motion does not state sufficient facts or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may in its discretion deny a hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 442. Whether a motion alleges sufficient facts on its face is a question of law. ***Ibid.***

¶10 We utilize a two-part test for ineffective-assistance claims. *See* ***id.***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 442. The defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Ibid.*** Prejudice is defined as "'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***Id.***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 443 (citation omitted). Johnson must prevail on both prongs to secure relief. *See* ***ibid.***

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶11 Here, we conclude that Johnson has failed to sufficiently plead prejudice, and the record conclusively demonstrates that he is not entitled to relief. As the State points out, Johnson's disability status was not disputed, despite the State's attempts to show that he had been working.[4] Rather, the State also emphasized that Johnson had two non-wage sources of income, from which he had been ordered to pay child support.

¶12 By raising an affirmative defense, Johnson had to demonstrate his inability to provide support by a preponderance of the evidence. WIS. STAT. § 948.22(6). His "defense" of an inability to *work* and earn a wage has nothing to do with his ability to *pay* support as ordered from his non-wage income. As a result, his disability status is irrelevant to his defense, so trial counsel's failure to support that status with the two letters was not prejudicial. In the absence of prejudice, counsel was not ineffective. The circuit court properly exercised its discretion in declining to grant a hearing.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[4] Johnson did not file a reply brief. Arguments unrefuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108–109, 279 N.W.2d 493, 499 (Ct. App. 1979).